IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE STEAMBOAT EUGENE, GASTON JACOBI and CHARLES RUFF,
Libellants and Appellees,

JOEL P. GEER, *Claimant and Appellant,*

WALTER M. CARY, FRED M. LYONS and EDWARD J. KNIGHT,
Intervenors and Appellees.

BRIEF OF APPELLEES

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.

SEATTLE, WASHINGTON.

LOWMAN & HANFORD S. & P. CO., SEATTLE

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BRIEF OF APPELLEES ON MOTION TO DISMISS.

MOTION TO DISMISS APPEAL.

Appellees hereby move the court to dismiss the appeal in this cause for the reason that the decree appealed from was not a final judgment, and therefore not one

from which an appeal might be taken according to law.

The decree in this case was an award of damages in favor of each of the libellants and intervenors in a fixed sum to each, with a direction that the vessel libelled be sold and the proceeds be paid into the registry of the court, but by its terms, the decree reserved other material issues in the case for further determination by the court.

(1) After fixing the amount of the appellees' several recoveries the decree provided—

"And it is further ordered that the claim of the intervening libellant, C. Hennigar, be reserved for such judgment or order as the court may deem just upon such further hearing as may be had upon the issues herein." (See Decree, Trans. pp. 405–407, Record p. ——.

C. Hennigar mentioned was a libellant who had lawfully intervened in the cause with leave, by the filing of his libel and stipulation for costs before default entered (See Trans. pp. 12–13, 14 and 404, and Record p. ——.

The claim of Hennigar was for repairs made subsequent to the original libellant's claims, and he sought priority over them. A stipulation signed by appellant's proctors as well as the proctors for appellees, was entered into in relation to the Hennigar libel as follows:

"It is hereby stipulated that the libel on account of repairs herein originally filed, shall stand herein as undetermined and an existing libel herein, and that the present owners of said claim for repairs shall, if they so desire, amend said libel and substitute for the original libellent, the present owner of said claim for repairs (Dated) November 30, 1897." (See Trans., p. 440, R. p.——

(2) And further, the decree appealed from did not make any distribution of the funds to come into the registry of the court or establish the priorities between the libellants and intervening libellants, but by its terms, the decree expressly reserved the matters of distribution and priority for the further judgment of the court. The decree in that respect provided—

"That the marshall shall pay the proceeds arising from such sale, after deducting the costs and expenses thereof, into the registry of this court, there to await the further order of the court in the premises as to the distribution of the same." (See Trans. p. 405-7.)

It is plain therefore from an inspection of the decree itself that the court below, in entering the judgment appealed from, did not complete its decretal action in the case, but expressly reserved the cause for the decision and determination of further questions between the parties from the decision of which future appeals might lie, namely:—

First—The question of the validity and amount of the undetermined libel of Hennigar, and,

Second—The question of priority between the different libellants and intervening libellants and the distribution of the funds, as well as the adjusting of costs.

Leaving either of these questions open for future decision, the decree would not be final and therefore not appealable, for there can be but one appeal in a cause.

The test of a final decree is stated by Chief Justice Waite to be as follows:—

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation be-

tween the parties on the merits of the case, so that, if there should be an affirmance here, the courts below would have nothing to do but to execute the judgment already rendered. If the judgment is not one which disposes of the whole case on the merits, it is not final."

Bostwick vs. Bunkerhoff, 106 U. S., 3.

The judgment here appealed from does not answer this definition, for if it should be affirmed, the court below would have still to determine on the other libel pending, on the matters of priority and distribution. From an error of judgment on these questions, a further appeal would lie.

"Where the district court of the United States, sitting in admiralty, decreed that a sum of money was due, but *the amount to be paid was dependent upon other claims that might be established*, this was not such a final decree as would justify an appeal to the supreme court." (Syllabus.)

Montgomery vs. Anderson, 21 How., 386.

And in the same case the court in its opinion says:—

"Under the act of Congress, no appeal would lie from the district to the circuit court until there was a final decree upon the whole case, that is, *not until all the claims on the money in the registry had been ascertained and adjusted* and the whole amounts of the proceeds of the sale *distributed* by the decree among the parties which the district court deemed to be entitled, according to their respective *priorities*."

Montgomery vs. Anderson, supra.

In the case of *Mordeci vs. Lindsay, 19 How., 199*, where the district court found in favor of libellants, but referred the matter to the clerk of the court "to ascer-

tain the charges to be made against the respective parties to the suit," it was held not to be a final decree.

"A decree setting aside a transfer and ordering a reference to ascertain amounts and priorities of creditor's claims, is not final within the rule."

Talley vs. Curtain, 7 C. C. A., 1.

"A decree awarding a certain rate of salvage of the proceeds is not a final decree, but at most only an interlocutory decree in the nature of a final decree," and in the opinion Judge Story said:—"It was interlocutory in its character for many purposes. It directed that *the charges and expenses of keeping and selling the property and the fees and charges of the officers of the court* to be first deducted from the proceeds of the sale. Now the exact amount of these charges and fees were not ascertained and were necessarily open to further inquiry, and might become matters of controversy between the parties in which they might have the right to take the opinion of the court."

The Steamboat New England, 3 Sumner, 495.

"In the district court the libel was dismissed and the damages against the captors. There had been a reference to a commissioner to ascertain the amount of the damages and before the report of the commissioner had been acted upon, the appeal was taken," * * * Chief Justice Marshall said: "The court has had the question submitted in this cause under consideration, and is of opinion that the appeal is not well taken. The decree of the district court was not final in the sense of the act of Congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages."

The Palmyra, 10 Wheat., 502.

Benedict's Admiralty (2d ed.), page 345, lays down the law in respect to what decrees in admiralty are final so as to be appealable, as follows:

"The final decree is not that which decides upon the substantial merits of the case, but that which completes the decretal action of the court. If, therefore, there remain to be made any order,—for costs,—for confirmation of a report,—for distribution, or other order which is but a consequence of the decree on the merits, the appeal cannot be entered until such order is made; that is the final decree; not till then is it in a state for execution without further action of the court below."

And in Henry's Admiralty Jur. and Pro., p. 391, it is said:

"A decree in favor of libellants for an ascertained amount payable out of a fund arising from the sale of a vessel, but the amount payable in the decree depended upon the ascertainment of other claims upon the same fund and not adjudicated, is not a final decree and no appeal will lie until all the claims on the money in the registry have been adjudicated, and a final decree of distribution has been entered, adjudging the respective priorities and rights of the parties entitled."

Under the authorities we respectfully submit to the consideration of the court that the decree in this case was not a final judgment from which an appeal would lie, and this appeal ought, therefore, to be dismissed.

BRIEF ON THE MERITS.

STATEMENT OF THE FACTS.

We are not satisfied with the statement of the facts contained in the appellant's brief. It is a very partial and incorrect summary of the case as presented by the record.

The trial court made no special findings of fact in the case but a general finding only, that all the allegations of the amended libel were sustained and proven by the evidence. The appellant made no request for special findings on any of the issues.

No bill of exceptions was ever prepared or settled, nor indeed is there any exception whatever in the record save only the general one noted at the foot of the decree that "Claimant Joel P. Geer excepts and his exception is allowed." (See Trans. P. 407.)

The rule of proceedure of this court, therefor, on appeals in admiralty becomes important, for if the practice of the Supreme Court prevails, this court cannot do otherwise than to dismiss the cause and affirm the judgment of the lower court; but if it is the rule of the old circuit courts prior to the creation of the circuit courts of appeal, then they may sift and weigh the evidence *pro* and *con*.

In the Fifth Circuit, (The Beeche Dene, 5 C. C. A. 208) it is held that the practice on appeals in admiralty

to the circuit court of appeals, is "like the supreme court practice." But in two of the other circuits (The Philadelphian, 9 C. C. A. 54, The Havalah, 48 Fed. 684) it is held differently, but neither of these last two authorities go so far as to hold that the circuit court of appeals will re-examine and weigh the whole of the evidence where there is no bill of exceptions settled, and where there is no special findings of fact.

As the record stands in this case, this court could not review the facts under the practice of the Supreme Court, for it is there held (The Abbotsford, 98 U. S. 440), that "The findings of facts by the circuit court in admiralty is conclusive; and only rulings on questions of law can be reviewed by bill of exceptions. * * * The decision of the court below in this respect is as conclusive as the verdict of a jury when the case is brought by writ of error."

See, also, The Benefactor, 102 U. S. 214, and The Sylvia Handy, 143 U. S. 515.

In a court like this, where the volume of business must be large and the labor great, it would seem to be a salutory rule to require that the issues be narrowed by the settlement of a bill of exceptions or the entry of special findings, instead of throwing the whole case open to inquiry as to all of the facts as well as the law. But should the court be of opinion that it is bound to weigh the evidence and make its own findings, then we respectfully submit that the following facts are proven:

1. That the Portland & Alaska Trading and Transportation Co., with whom appellees contracted, were the

owners of the vessel *pro hae vice*, with full authority to bind the vessel to the appellees for the fulfillment of their contracts; that this company had full possession of the vessel and manned and victualled her, and controlled her navigation; that they held themselves out to appellees and to the world as owners in fact, and appellees had no knowledge or notice of claimant's interest in the vessel; that the vessel was not employed differently from the terms of the lease in contracting to carry appellees;

2. That the vessel had entered upon the performance of its contract with appellees; that the passage money had been paid; that the appellees surrendered themselves and delivered their baggage and goods into the charge of the agents and managing owner of the vessel in control of the expedition; that the vessel entered upon the voyage and proceeded out to sea several hundred miles and was compelled to abandon it only because of her unseaworthy condition;

3. That the abandonment of the voyage by the Eugene was due entirely to her unseaworthy condition and not to the perils of the sea or the act of God;

4. That the damages awarded to appellees were not excessive under the circumstances but fair and reasonable;

5. That the appellees Lyons, Cary and Knight were properly in the court below and were parties to the record in whose favor a decree might enter.

Instead of entering here into a review of the evidence establishing these facts, we will refer to the evidence

more at large in discussing the several points raised in appellant's brief in their order.

I.

It is contended first by appellant, that the charterers or lessees of the vessel (The Portland & Alaska Trading & Transportation Co.) could not by their contracts with appellees to carry them, bind the interest of the general owner in the vessel to the performance of these contracts. This raises a mixed question of law and fact. We will review the evidence briefly bearing upon this point:

FACTS.

(*a*) There is no question made by appellant but that the charterers had the full possession of the vessel, that they manned and victualled her, and controlled her navigation. The lease or charter party says that the owners "do hereby turn over the possession of the said steamer Eugene to the said Portland & Alaska Trading & Transportation Company." (See Appellant's Brief, p. 7.)

On page 195 of the transcript (Record, p. ——), the claimant Joel P. Geer testified:

"Q. When was the possession of the boat delivered to the McGuires, or the Portland & Alaska Trading & Transportation Company?

"A. I suppose they took possession as soon as they started from Portland with it. They had their own captain, Captain Lewis, had possession of her of course. I took her down to Astoria for him because he did not know the river very well.

"Q. They employed their own captain, crew and pilot?

"A. Yes sir.

"Q. Had full charge of the navigation of the vessel from that on?

"A. Yes sir; they had full charge."

The testimony of Jones, another part owner, was to the same effect. (See Trans., p. 201.)

(*b*) With the knowledge and consent of the claimant Geer, the Portland & Alaska Trading & Transportation Co. held themselves out to the world and to appellees, not as the charterers or lessees, but as the owners in fact of the vessel, and appellees dealt with them believing them to be the owners.

In the published advertisements, the Portland & Alaska Trading & Transportation Co. were always referred to as "the *owners* and managers" of the Eugene. (See Trans., libellants' exhibits "A" to "J.")

In the agreement with Davidge & Co. the Portland & Alaska Trading & Transportation Co. are again mentioned as owners in the following language: "Whereas the said Portland & Alaska Trading & Transportation Company, a corporation, are the managers and *owners* of the stern-wheel steamer Eugene, an American registered boat, etc." (See Trans., p. 108.)

Furthermore the libellants were all strangers on the Pacific coast, having recently arrived from the east. (See testimony of Jacobi and Ruff, pp. ————). The port of enrollment of the Eugene was Portland, Or., but the libellants dealt with her agents and representatives

at Seattle, Wash., which was not her home port, neither was it the residence of any of her owners nor of the charterers, the P. & A. T. & T. Co., which was a Portland corporation.

It is not pretended by appellant that the appellees had any knowledge or notice of the claimant Geer's interest in the vessel, or that they had knowledge of any facts that would put them on inquiry.

(*c*) But aside from the foregoing facts, appellant has expressly admitted that under the charter-party the charterers had the authority and right to employ the vessel in the very manner in which she was employed in entering into these contracts with appellees.

On pages 194 and 195 of the transcript the claimant Geer testified:

"Q. What they did then in relation to these passengers was no breach of the contract (charter-party) in itself; if nothing else occurred they had that right under the contract?

"A. I suppose they did. What do you mean, *the right to transport passengers in the way they did?*

"Q. Yes sir, as far as they had gone, or farther, if the expedition had been successful; but the breach of the contract that you claim consisted in delays?

"A. *Yes sir, that is the breach of the contract that I claim, delays.*

"Q. And not the failure to deliver her there. You say you took the whole risk of getting her through safely?

"A. I took the risk myself of the boat in case of rough weather or anything.

"Q. You say it was an experiment?

"A. Well I claim it was an experiment on my part.

"Q. And you took the chances of the result?

"A. I took the chances of getting the boat up there in the first place."

Francis B. Jones, the other part owner with claimant, on page 201 of the Transcript, testified—

"Q. Mr. Jones, it was understood with the McGuires (the P. & A. T. & T. Co.) that the Eugene would have to be towed through by some other vessel?

"A. Either towed or conveyed in some way.

"Q. And it was talked of that the vessel would take passengers, was it not?

"A. Yes, sir.

"Q. Even before the agreement (charter- party) was signed?

"A. Yes, sir.

"Q. You mean a steamship to take passengers?

"A. Yes, sir.

"Q. And if towed to St. Michaels there the passengers would be transferred to her—now the whole arrangement was talked over and that was the very purpose of their getting possession of the Eugene?

"A. *Yes, to handle passengers and freight.*"

Here is an admission that the vessel was not employed contrary to the terms of the charter-party.

(*d*) The claimant Geer was on board the Eugene. when this very voyage was undertaken and remained on board during the whole of the trip up to the time of its abandonment, and knew all that was being done with the boat and made no protest. (See testimony of Geer, Trans., p.——)

(*e*) F. B. Jones, the joint owner of the Eugene with claimant, was also one of the incorporators of the Portland & Alaska Trading & Transportation Co., and was therefore an actual party to the contracts of that company made with appellees. (See Trans, p. 191 and 192, Testimony of Jones.)

AUTHORITIES.

Upon this state of facts the court ought to hold with the court below that the relation of the P. & A. T. & T. Co., the charterers to the Eugene, was such as to bind the vessel to a performance of the contracts entered into with the appellants. It clearly brings the case within the settled rule of law that wherever the general owner charters or leases a vessel, giving to the charterer or lessee the possession of the vessel and control of her navigation, the latter is deemed to be the owner of the vessel for the purpose of binding her to a performance of all contracts made by him in that behalf.

"*The charterer* of any vessel, in case he shall man, victual and navigate her at his own expense or by his procurement, *shall be deemed the owner* of such vessel within the meaning of the provisions of this title, * * * and *such vessel when so chartered shall be liable in the same manner as when navigated by the owner thereof.*"

R. S., Sec. 4286.

"If the general owner has allowed a third person to have the entire control, management and employment of the vessel, and thus become owner *pro hac vice*, the general owner must be deemed to consent that the special owner or his master may create liens binding on the interest of the general owner of the vessel as security for the performance of *contracts of affreightment.*"

The Freeman, 18 How. 182.

"Where the general owner allows the charterers to have the control, management and possession of the vessel and thus to become the owners for the voyage, he must be deemed to consent that the vessel would be

answerable for necessary repairs and supplies furnished at a foreign port for the prosecution of the voyage."

The India, 16 Fed. Rep. 262.

"Under the charter of a steam vessel by which the charterer becomes the owner for the voyage and charged with her navigation, the *agent of the charterer* can bind the vessel for coal necessarily furnished to her in a foreign port, although the person furnishing the coal knew of the charter, and knew that according to its terms, the charterer was bound to furnish coal for the voyage."

The City of New York, 3 Blatchford, 187.

II.

The second point raised by appellant is that the contracts with appellees were executory only and therefore the jurisdiction of admiralty did not attach and the vessel could not be held on a proceeding *in rem.*

This presents to the consideration of the court purely a question of fact, for appellees do not contend, and did not in the court below, that a proceeding *in rem* will lie against a vessel to recover damages for the breach of a purely executory contract, but by an examination of the evidence in the case this court must be convinced, as the court below was convinced, that these contracts were not executory but that performance had been entered upon. Indeed, it would seem to be but trifling with the time of the court, to urge that the contracts were executory only.

And the court below nowhere held that a proceeding *in rem* would lie upon a purely executory contract. The original libels filed herein failed to allege that

performance had been entered upon, (an allegation that was supplied in the amended libels), and claimant excepted to the original libels on this ground. The court below sustained the exceptions on that ground and delivered a written opinion in making its ruling. (See Trans. p. 26 to 30). In its ruling there the court went to the greatest possible length of the law in Claimant's favor, holding that rights *in rem* did not attach by the payment of the passage money—a holding which is not directly supported by any previous decision. Yet notwithstanding these extreme views of the trial Judge upon the rule of the admiralty law as to executory contracts, still upon the amended libels and the proofs offered at the trial, he found that the contracts were not executory, but were partially executed and performance had been entered upon. This is a question of fact to be determined.

Now appellant cites in support of his position that the court below ought to be reversed, this very decision of Judge Hanford's, (the trial Judge), in this very case and on the very point raised by appellant. (See Appellant's Brief p. 31). It is certainly a most strange thing that an appeal should be taken from the decision of a court and that the opinion given by that court in rendering its decision, should be cited and relied on by the appealing party as an authority in law for the reversal of that very decision, as is done by appellant here. At the least this goes to show that the appellant is satisfied with the rule of law applied to the case by the court below, and that the grievance complained of is really against the facts found.

The following is a brief summary of the facts bearing upon this branch of the case:

In July, 1897, Joel P. Geer and Francis B. Jones, the then owners of the Steamer Eugene chartered that vessel to the Portland and Alaska Trading and Transportation Company, a corporation at that time newly organized, and of which said Francis B. Jones was one of the corporators and interested.

The Eugene at that time was a steamer registered at Portland, Or., her home port, and all of the parties to the charter were residents of Portland.

Geer and Jones afterwards incorporated under the name of the Yukon Transportation Co., and transferred the Eugene, subject to the charter, to that company, as manager of which company Geer defended this action in the lower court and prosecutes this appeal here.

Immediately on the making of the charter-party, the Eugene was delivered over to the charterers, the P. & A. T. & T. Co., which company took full possession of her, spent a large sum of money in overhauling and repairing her, and employed their own crew, captain, pilot, furnished the provisions and had full charge of her navigation.

The Eugene was chartered to the P. & A. T. & T. Co., for the purpose of engaging in the Alaskan transportation business.

Thereafter and about August 15th, the P. & A. T. & T. Co. placed an agent at Seattle, Wash., to sell passage on the Eugene expedition from Seattle to Dawson City, N. W. T., to all persons desiring the same to the number of 300.

Extensive advertisements of the Eugene expedition were circulated and sent out at Seattle, in the form of bills and posters, and long and graphic descriptions of the trip published daily in the daily papers of Seattle. (See Trans., libellants' exhibits "A" to "J.")

In these advertisements the Portland & Alaska Trading & Transportation Company held themselves out as

"*the owners and managers*" of the Eugene, and no suggestion that they were charterers.

The expedition was advertised to leave Seattle on August 24th, and a guarantee was published that all passengers engaging passage would be landed at Dawson City, N. W. T., not later than September 15th, 1897, and before the freezing of the Yukon river.

The advertisements were of the most alluring and lavish character in their praise of the seaworthy condition of the Eugene, the experience of her captain and pilot and their knowledge of Alaskan waters, as well also as of the accommodations that would be afforded passengers.

The rate to be paid by each passenger was fixed at $300.00 for the full trip from Seattle to Dawson City, and passengers were allowed to take 1500 pounds of baggage and outfits.

The P. & A. T. & T. Co., charterers, engaged the S. S. Bristol of Victoria, B. C., to tow the Eugene to St. Michaels at the mouth of the Yukon river. (See Trans., p. 108.)

E. B. McFarland, the general manager of the Portland & Alaska Trading & Transportation Co., was to accompany the expedition, and did in fact accompany it, in full charge and control of the passengers and their effects.

The libellants, strangers in Seattle lately from the eastern states, relying on the published advertisements, bought passage on the Eugene expedition from Seattle to Dawson City, paying three hundred dollars each; they dealt with the P. & A. T. & T. Co. through its Seattle agent, and its president, H. P. McGuire, and secretary, W. W. McGuire. The passage money was paid in a lump sum direct to this company, the charterers of the Eugene, and at the same time the substance of the published advertisements was repeated to them by the agent and the two McGuires.

They were told to deliver their baggage and outfits at the "Yesler Wharf," in Seattle, marked "In care of

S. S. Eugene," and at that point this company would assume control of them.

They delivered their goods according to instructions at this wharf, and there, H. P. McGuire, president of the company, and an agent of the company, took charge of it.

At this time the plans of the expedition were altered slightly; instead of leaving Seattle in tow of the Bristol, it was fixed that the Eugene would leave Victoria, in tow.

The passengers were told to present themselves at the Yesler wharf in Seattle, and free transportation, food and beds would be furnished them by the P. & A. T. & T. C., to Victoria to join the Eugene expedition at that point.

This was accordingly done; the passengers, including the libellants, presented themselves at the wharf in Seattle, and were there met by H. P. McGuire who took them in charge, assigned them to state rooms in the Victoria steamer, paid their passage, accompanied them to Victoria. On arriving at Victoria it was found that the Eugene had not yet arrived and would be delayed several days; whereupon McGuire took the passengers to a hotel where he arranged to pay their expenses to await the Eugene and the Bristol, and there McGuire turned over the charge of the passengers to E. B. McFarland, the general manager of the company, and in whose charge the passengers after remained. The passengers were repeatedly assured by both McGuire and McFarland that the baggage and outfits of the passengers were under the care and control of the P. & A. T. & T. Co., and all the details of the shipment had been attended to.

On the arrival of the Eugene and Bristol, the expedition started, under the management and control of McFarland. The Bristol took the Eugene in tow in Victoria harbor. The passengers themselves were put on board the Bristol, but were on and off the Eugene at will at different places on the voyage.

The two vessels, the Eugene in tow of the Bristol, continued the voyage for several hundred miles up the coast. At Comox, a wayport, they stopped to take on coal, and there the baggage and outfits were shifted from one vessel to another, the libellants, Jacobi and Ruff testifying that portions of their outfits were seen by them on board the Eugene at this point, and they themselves were aboard of her.

After continuing on the voyage for a day or two longer, the Eugene broke down and was unable to go farther, and by request of E. B. McFarland, who was present with the passengers, and by request also of Capt. Lewis, captain of the Eugene, the expedition was turned back and the Eugene towed into a place of safety at Alert Bay, there to decide, by conference between the passengers and McFarland and the captains of the two vessels what further should be done.

The Eugene was there examined by a committee of the passengers in company with Captain Lewis, and all including Captain Lewis of the Eugene, pronounced the Eugene unseaworthy and unable to make the voyage; and thereupon E. B. McFarland, as manager of the P. & A. T. & T. Co., declared that the voyage was abandoned, and by a speech publically made to the passengers, laid the whole blame to the unseaworthy condition of the Eugene. Capt. Lewis of the Eugene was present and assented to and concurred in all that McFarland did. McFarland delivered the following written statement to the master of the Bristol: (See Trans. p. 118.)

ALERT BAY, Sept. 6, 1897.

Capt. James McEntyre, Commander S. S. Bristol:

SIR:—*In view of unseaworthy condition of Steamer Eugene rendering her unfit for voyage to St. Michaels*, even with repairs it is impossible to make with means available, and furthermore owing to the urgent request of a large number if not all of the passengers aboard the S. S. Bristol that said S. S. Bristol return to Victoria, B. C., in consideration of which we hereby release and absolve said S. S. Bristol, etc."———

"Furthermore we hereby agree to indemnify and protect the S. S. Bristol and her charterers against any and all claims which the passengers on board said S. S. Bristol may make against said Bristol or her charterers by virtue of and under tickets which they held as passengers on S. S. Bristol and under shipping receipts for transportation of freight.

PORTLAND & ALASKA
TRADING & TRANSPORTATION CO.,
By E. B. MCFARLAND,
Vice Pres. and General Mgr."

Captain Lewis of the Eugene also wrote and delivered to the master of the Bristol, a request that the voyage be abandoned and the passengers carried back. (See Trans. p——).

The whole voyage was then abandoned, the Eugene was towed back to Victoria and there the passengers were left, and on the arrival of the Eugene at Seattle, these libels were filed against the vessel.

On this state of facts we think the court must find, with the court below, that performance had been entered upon by the Eugene and the contract was not purely executory as contended by appellant.

"The lien upon a vessel for the safe custody and transport of goods to be shipped in her attaches at the time of the delivery of such goods to her *agents or owners.*

Pearce vs. The Thomas Newton, 41 Fed. 106.

We quote below at some length from the opinion of the court in the case of Pearce vs. Thomas Newton, above cited, because it is a review of the principal authorities relied upon by the appellant here in his brief:

"It is contended that the injuries were received before the goods reached the vessel, and therefore no action *in rem* lies. The proposition laid down in claimant's brief, and for which he cites many authorities, is admitted. It is:

'No lien on a vessel lies until a lawful contract of affreightment is made, and a cargo shipped under it.'

The words are used in numerous cases of authority. The fallacy lies in an incorrect meaning attached to the word 'shipped.' The sentence is in substance to be found in the opinion of the supreme court in the *Freeman vs. Buckingham*, *19 How. 182*, cited in claimant's brief, and is used with little variation of phrase in *Vanderwater vs. Mills*, *19 How. 82*, and *Pollard vs. Vinton*, *105 U. S. 7–12*. In all these cases the question was whether there was a contract of affreightment. In the *Freeman vs. Buckingham*, the master had given a bill of lading for goods never shipped, and an assignee had libelled the vessel. In *Vanderwater vs. Mills* the owners of the libelled vessel had made a contract to carry freight from a certain port to another, but had never set their vessel to the proposed port of shipment. In neither case had any goods been delivered to the master of the vessel *or its agents*. In *Pollard vs. Vinton*, *105 U. S. 7–12*, Miller J., says:

'Before the power to make and deliver a bill of lading could arise, some person must have shipped goods under it. * * * In saying this *we do not mean that the goods must have been actually placed on the deck of the vessel. If they come within the control and custody of the officers of the boat, for the purpose of shipment the contract of carriage had commenced.*'

The case of *Bulkley vs. Cotton Co.*, *24 How. 386*, is one in which no lien could have been enforced; did the word 'shipped' bear the interpretation contended for. The Bark Edwin, lying below the port of Mobile, had contracted to carry 707 bales of cotton to Boston, and the injury to the goods for which she was libelled happened by the explosion of the boiler of a steamboat employed to carry them from the wharf to the Edwin, and

before they reached the bark. Nelson, J., says in delivering the opinion of the supreme court:

'The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien; * * * and we do not see why the lien may not attach when the cargo is delivered to the master for shipment, before it reaches the hold of the vessel.'

To the same effect is The Oregon, Deady 179, affirmed in the Circuit Court on Appeal by Field, J."

See Pearce vs. The Thomas Newton, supra.

In *Bulkley vs. Cotton Co., 24 How. 386*, it was held that the lien on the vessel would attach upon the delivery of the goods to a lighter employed by the vessel, and the court in its opinion said:

"The argument urged against the lien of the shipper seems to go to the length of maintaining that in order to uphold it there was a physical contact between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. *There is no necessary physical connection between the cargo and the ship as a foundation upon which to rest this liability.*"

"Where an ocean steamer is making regular voyages to port, and for any reason she is unable to reach such port, and the agent of her owner charters a steamboat to take the passengers and freight down the river to such steamer and bring back her cargo, a delivery of the goods under such circumstances to the steamboat for the purpose of being conveyed to the steamer, is a delivery to the latter and she is thenceforth bound."

The Oregon, Deady, 179.

"It does not require physical contact between the cargo and the ship to create the lien, nor does the mere unlading of the merchandise on the wharf or even in the warehouse discharge the lien, but *a constructive possession* is sufficient to support it."

Henry's Adm. Jur. & Pro., p. 180.

"Delivery to a carrier should be according to the usage of the business and is either actual or constructive; and the delivery is complete if the master, mate, *or other agent of the owner*, receives them at the ship or on the *wharf* or in the *warehouse*."

2 Parson's on Contracts, pp. 175, 6, 7.

A vessel carrying passengers for hire stands on the same footing of responsibility as one carrying merchandise, the passage money in the one case being equal to the freight in the other.

The Moses Taylor, 4 Wall., 411.
The Abeffoyle, 1 Blatch., 360.

"There is no difference in point of law between common carriers on land and common carriers by water." (Judge Story.)

King v. Shepherd, 3 Story, 349.

"A general ship is a common carrier."

The Saratoga, 20 Fed., 869.

"If there is an agreement that property intended for transportation by a carrier may be deposited at a particular place without express notice to the carrier, such deposit without notice is a delivery. The acceptance by the carrier is complete and his liability fixed when ever property thus comes into his possession."

Pratt vs. R. R. Co., 95 U. S., 43.

The appellees in this case had performed the contracts on their part as far as it was in their power. They paid the passage money in full; they delivered their goods to the officers of the company, and surrendered themselves into the control of the manager of the expedition and the captain of the vessel, and they departed on the voyage.

Nelson, J., the distinguished admiralty judge, held in an elaborate opinion, that the payment alone of the passage money by a passenger was such a performance of the contract in itself, that a lien upon the vessel would attach in his favor from payment of the passage money alone.

The Pacific, 1 Blatch., 569.

The authority of *The Pacific* is recognized in the case of *The City of Baton Rouge, 19 Fed., 461*, where it is said that the payment of the passage money is so far a performance of the maritime contract in itself, that the jurisdiction of admiralty attaches.

And in the case of *Scott vs. The Ira Chaffee, 2 Fed. Rep., 404*, cited in Appellant's brief and relied on as a leading case in favor of his position here, the court, commenting on the case of *The Pacific* in the *1 Blatch.*, says,—"But it would seem that the decision there "might also be sustained upon the ground that the "libellant himself had partly performed his contract *by* "*the payment of the passage money*, and his preparations "for settlement in California. *I do not deem the case* "*inconsistent with the other authorities* which hold that

"in cases of purely executory contracts the libellant "cannot proceed against the vessel."

But in the present case there had been an entry upon performance, and a part performance by the vessel herself.

III.

The third point made by appellant in his brief is, (1) that the abandonment of the voyage by the Eugene was due to the bad weather encountered, and (2) that the whole expedition was but an experiment. For these reasons it is claimed that the Eugene was released from liability.

No more than the ordinary weather of that region was encountered on the voyage. There was a stiff wind but no witness on the stand in the whole case said there was a storm. The whole evidence shows clearly that the abandonment of the voyage was due to the unseaworthy condition of the Eugene.

As to the matter of its being an experiment, it is certainly a strange claim that one can enter the business of a common carrier and after making default and failure upon his contracts to carry, make a good answer to the injured party by saying the business was an experiment. Common reason and the law are against this.

"Whoever undertakes the business of a common carrier of persons is bound to know the hazards to which it is exposed."

Saltonstall vs. Stockton, Taney's Rep., 11.

IV.

The fourth point raised by appellant's brief seems to us to be but a repetition in another form of the same question raised in the second point and there discussed in this brief. It is idleness to say, in the face of the evidence, that no breach of the contracts to carry was shown.

V.

It is insisted by appellant that the sum of $800 damages awarded to each of the libellants was excessive, but we think that on a review of the evidence the court will be satisfied that the amount is not unreasonable.

The libellant Ruff was a machinist and mechanical engineer, and before going on this trip, was foreman in a large manufacturing plant; Jacobi testified that he was capable of earning from $5 to $10 a day at his trade on contract work.

But the hardships and perils they were exposed to is an element to be considered in fixing damages, and the disappointment in not reaching their destination at all, and necessitating their waiting over another year to make the trip.

All things considered, the damages allowed were low and by no means excessive or unreasonable.

VI.

The last point raised by appellant is that, as to the intervening libellants, Lyons, Knight and Cary, they were never in court at all, and the court had no jurisdiction to render any judgment whatever in their favor.

On November 6th, 1897, the intervening libellants, Lyons, Knight and Cary, prepared and delivered to the clerk of the court below, their libel in intervension.

(See printed Record, p. 360 to 367.)

On application an order of court was made below granting leave to file intervening libel, and the following order was endorsed thereon:

"Upon motion of proctors for libellants made in open court, leave to file the foregoing intervening libel is hereby granted; four days to answer.

"Nov. 6, 1897. C. H. HANFORD,
Judge of said Court."

(Printed Record, p. 366.)

On November 5th, this intervening libel of Cary, Lyons and Knight, was duly served on proctors for claimant, and their admission of service endorsed as follows:

"Service of the within paper on the undersigned this 5th day of November, 1897, is hereby admitted.

WILLIAMS, WOOD & LINTHICUM, and
STRUDWICK & PETERS,
Attorneys for Claimant."

(Record, p. 366.)

The clerk of the court below made the following endorsement upon the libel:

"Intervening Libel of Walter M. Carey, et al. presented and offered for filing in my office, and fee for filing paid to me, Nov. 6, 1897, but withheld from filing awaiting stipulation for costs.

R. M. HOPKINS, *Clerk*,
By H. M. WALTHEW, *Deputy.*"

(Record p. 366 67).

On Nov. 20th, thereafter, a stipulation was entered into between the respective proctors for the libellants,

the claimant and the intervening libellant, in the following words:

"It is hereby stipulated and agreed by and between the parties to the above entitled action, that upon the filing of this stipulation the above cause may be set down for trial by the court so as to be tried on the 27th day of Nov. 1897, as early a date thereafter as the court may fix.

It is further stipulated that *the cause, as to the intervening libellants herein, shall be submitted and tried* at the same time as the principal cause and shall abide the issue therein; that *the answer* of the claimant herein *shall stand as the answer to the intervening libel*, and *all evidence* introduced in reference to libellants Jacobi and Ruff, *shall be considered as applying also to intervening libellants;* and all evidence on behalf of claimant shall be considered against said intervening libellants.

Nov. 20, 1897. (Signed)

STRUDWICK & PETERS and
WILLIAMS, WOOD & LINTHICUM,
Proctors for Claimant;
JOHN C. HOGAN,
Proctor for Libellant;
PATTERSON & EASLY,
For Intervening Libellant and for Libellant."

(Record p. 368 and 369.)

Cary, Knight and Lyons were considered as parties to the cause throughout the taking of the testimony. (See Record p. 175.)

The decree of the court in relation to the intervening libellants provided:

"And a stipulation having been duly entered into and filed in this cause by the respective parties, wherein it

is stipulated and agreed that the intervenors, Fred M. Lyons, Walter M. Cary and Edward J. Knight shall abide the result of the trial of the issues between libellants and claimant herein, and shall be entitled to the same recovery, * * * It is ordered, etc.

(See Record p. 307-8.)

Appellant fails to point out in his brief on what grounds he bases his conclusion that the intervening libellants, Cary, Knight and Lyons were not before the court below as parties, but we assume that it is because of their failure to file a stipulation or bond for costs below.

We concede that no bond for costs on behalf of such intervenors was filed, but this was a mere irregularity which the appellant waived below.

Appellant never raised the objection in the court below that no bond for costs by the intervenors was given. Had this been done the court below would no doubt have directed the bond to be entered into and on default of the same, dismiss the intervening libel. But appellant chose to deal with the intervenors, by putting in an answer to the intervening libel (or what was the same thing, agreeing that the answer to the principal libels, should stand also as an answer to the libels in intervention), and by stipulating with the intervenors to abide the result of the trial on the libels in chief.

It is true that in admiralty, anything going to the jurisdiction of the court over the *subject matter* cannot be waived by the parties, but one merely affecting the personal rights of a party in a matter of procedure, is waived unless objection is made.

That a bond for costs in admiralty is waived unless objection be reasonably made, see

Polydon vs. Prince, *Ware*, *p. 402.*

"If a claimant is admitted without objection (that no bond is filed) and allegations or pleadings on the merits are subsequently put in, it is an admission that the claimant is rightly in court and capable of contesting on the merits."

Henry's Ad. Jur. & Pro., *p. 341.*

U. S. vs. 422 Casks of Wine, *1 Peters* (*Supreme Court*), *547.*

In this case the answer of the appellant to the libel of the intervenors, by stipulation, was an admission on his part that the intervenors were properly before the court.

Ganes vs. Travis, *Abb. Adm. 297.*

In rendering its decree the court followed the agreed terms of the stipulation between the parties, then on appeal taken, the appellant for the first time raises the objection that no bond had been filed by the intervenors with whom before he stipulated. It would seem that the objection comes too late.

On the whole case, we respectfully submit that the court below committed no error, and that its judgment ought to be affirmed.

Respectfully submitted.

JOHN C. HOGAN AND
PATTERSON & EASLY,
Proctors for Appellees.